Public Prosecutor v Mahfar bin Sairan

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–7 OF 1999
KANG HWEE GEE J
29 FEBRUARY 2000

Criminal Law *— Causing death by negligence — Accused drove car into deceased wife while reversing — Accused to take precautions to avoid causing injuries to deceased — Section provides for single offence of causing death by rash or negligent act — Whether offence proved — Penal Code s 304A*

Criminal Law *— Culpable homicide not amounting to murder — Accused drove car into deceased wife while reversing — Intention to cause death, whether formed — Knowledge that act was likely to cause death, whether proved — Whether knowledge that act was likely to cause grevious hurt sufficient — — Penal Code s 304*

Criminal Law *— Murder — Accused drove car into deceased wife while reversing — Intention to cause death, whether formed — Penal Code s 300*

The accused was charged with the murder of his wife ('the deceased'). He was alleged to have caused her death by driving his Mercedes Benz into her on the road in front of their house after he had reversed the car out of the porch. At the time of the incident, their gardener Zulkifli was tending to the garden by the side of the porch. Zulkifli testified that he saw the accused reversing his car out of the porch and the deceased chasing after the car. After the accused had completed reversing his car out of the compound of the house and was out of his view, he heard the scream of a woman. He went out to investigate and saw a Proton Wira being driven away followed by the Mercedes Benz. The driver of the Proton Wira, Rahim — the brother of the accused — testified that the deceased had run after the car as the accused was reversing his car out of the porch. She went on to hold on to the right wing mirror when the accused had completed reversing the car out of the porch of the house and was in a position to move forward. Apart from the evidence of Rahim and Zulkifli, forensic evidence had clearly established beyond doubt that the deceased had been run over by the accused's car. The accused maintained that he did not know how his wife came to be injured and claimed that he was not aware that she had chased after his car. He was also not aware that she had grabbed the right wing mirror of his car. The issue was whether the accused had committed: (i) the offence of murder under s 300 of the Penal Code; or (ii) whether he could be convicted under s 304(a) or (b), ie culpable homicide not amounting to murder; or (iii) whether he had committed an offence of causing death by a rash or negligent act under s 304A.

Held:

(1) Given the fact that the deceased had chased after the accused's car and had held on to its right wing mirror while he was reversing it out of the porch, common sense dictates that the intention to

cause the death of the deceased could not have been formed in the mind of the accused at the time the deceased ran out of the house. Neither could it be formed at the time she held on to the wing mirror as in the normal cause of event no person could have harboured that intention on the spur of the moment within that split second in time. Once the accused stepped on the accelerator to move the car forward and in the process had knocked down the deceased, he would not be in a position to control the seriousness of the injuries that would befall her. Clearly the injuries were a manifestation of the consequence of his act rather than a manifestation of his intent. As the offence of murder under s 300 of the Penal Code provisos (a), (b) and (c) requires the mental element of intention to kill, it follows that the accused could not be called to enter his defence on a charge of murder under provisos (a), (b) and (c) of s 300 of the Penal Code (see p 803C–F).

(2) Under proviso (d) of s 300, the prosecution must prove that the accused knew that his act of moving the car forward in the way he did was so imminently dangerous. Taking into consideration where the deceased was at that point of time, the accused would not reasonably be expected to know that driving the car off in the manner he did was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The incident could have occurred as a direct result of having been knocked down unintentionally by the accused rather than by the deliberate act of continuing to drive the car over her to cause the injuries after having known that the deceased had been knocked down. He would be expected of course as a reasonable man to know in that situation that some grievous hurt would be caused to the deceased but this was insufficient to find a case within proviso (d) of s 300 (see pp 803I–804A, C–E).

(3) Section 304(a) requires intention to cause death or such bodily injury as is likely to cause death. Having found that there was no such intention on the part of the accused, it follows that the accused could not be convicted of this offence. Section 304(b) on the other hand merely requires knowledge, whether direct or constructive. Given the situation the accused was in, the court was unable to come to a finding that the accused had the knowledge that, by accelerating while the deceased was at the right side of the car holding on to the wing mirror, this act was likely to cause the death of the deceased (see pp 805D–F).

(4) One can of course reasonably conclude that by accelerating away in such a violent manner the accused had the knowledge that some harm may be caused to the deceased to the extent that some form of grievous hurt could have been caused to the deceased. But the offence of culpable homicide requires knowledge that death is likely to result — not merely knowledge that grievous hurt is likely to result. Accordingly, the court found that the accused could not

A under the circumstances have committed an offence of culpable homicide not amounting to murder under s 304(a) or (b) (see pp 805H–I, 806D).

(5) An essential ingredient of the offence of causing grievous hurt requires an accused to commit that offence voluntarily as defined under s 39 of the Penal Code. In as much as his action lacked intention or knowledge, it also lacked that essential element of 'voluntarily'. It was clear that the accused's conduct fell short of being voluntary and therefore a charge for an offence of causing grievous hurt could not be preferred (see pp 806F, G, 807A).

(6) The court found that the accused's culpability fell under s 304A of the Penal Code. From the time the deceased had held on to the mirror, the accused must be taken to have assumed the responsibility not to do anything rash or negligent that may cause any injury to the deceased. By driving off at that point of time, the accused had exhibited a conduct indicative that he had not taken any adequate and proper precaution to avoid causing her the injuries and was therefore rash and negligent (see pp 807B, 808F).

(7) While the court could accept as plausible that the accused may not have realized in the initial stage while reversing his car that the deceased had chased after him after he had signaled to her to stop, the court could not accept his claim that he was not aware or conscious that his wife had held on to the right wing mirror. It was incredible that he could have failed to notice her presence given that she had just ran out of the house and was just inches away from him when she was holding on to the wing mirror (see pp 812H–813A).

(8) The accused could not have been unaware of the likelihood of injury to the deceased when he drove his vehicle off while the deceased was just by the side of his car holding on to the wing mirror. He was expected under the circumstances to have taken proper precautions to avoid causing the injuries to the deceased which he had failed to do. He was therefore rash or negligent or both. He had failed to raise a reasonable doubt in the case for the prosecution on the charge and must accordingly be found guilty and convicted of the charge as amended (see p 813D–F).

(9) Section 304A does not prescribe two distinct offences of: (i) causing death by a rash act; and (ii) of causing death by a negligent act.. The section merely provides for a single offence of causing death by a conduct which can be described as rash or negligent but falling short of culpable homicide. Even assuming that the charge had been incorrectly framed to describe the accused's conduct as 'rash and/or negligent' when it should have only described it as either being rash or being negligent, the error relates at most to the particulars of the charge which had not

prejudiced the accused. It could therefore be saved under s 156 of the Criminal Procedure Code (see p 815A–B, H–I). A

(10) Taking all relevant factors into account, in particular the adjustments that the accused had to make in living with the deceased (a fact not disputed in evidence) which probably could have led him to act in such a rash and negligent manner on the day in question, and the age of the accused, the sentence shall be an imprisonment for a period of six months with effect from the date of arrest (see p 816G–H). B

[Bahasa Malaysia summary C

Tertuduh telah dituduh membunuh dengan niat isterinya ('si mati'). Beliau telah dikatakan menyebabkan kematiannya dengan memandu kereta Mercedes Benznya ke arah si mati di atas jalan di depan rumah mereka selepas beliau mengundurkan keretanya dari luar anjung. Pada masa kejadian tersebut, tukang kebun mereka Zulkifli sedang D bekerja di taman di tepi anjung rumah tersebut. Zulkifli memberikan keterangan bahawa beliau telah melihat tertuduh mengundurkan kereta ke luar anjung rumah dan si mati mengejar kereta tersebut. Selepas tertuduh selesai mengundurkan kereta dari perkarangan rumah dan di luar pandangannya, beliau mendengar jeritan seorang wanita. Beliau telah pergi menyiasat dan melihat sebuah Proton Wira E telah dipandu keluar diikuti oleh Mercedes Benz. Pemandu Proton Wira tersebut, Rahim — adik tertuduh — memberikan keterangan bahawa si mati mengejar kereta tersebut semasa tertuduh mengundurkan kereta dari anjung rumah. Si mati telah memegang bahagian kanan cermin kereta semasa tertuduh selesai mengundurkan F kereta dari luar anjung rumah dan berada dalam kedudukan untuk bergerak ke hadapan. Selain daripada keterangan Rahim dan Zulkifli, keterangan forensik dengan jelas membuktikan melampaui sebarang keraguan bahawa tertuduh telah dilanggar oleh kereta tertuduh. Tertuduh menegaskan bahawa beliau tidak tahu bahawa si mati telah mengejar keretanya. Beliau juga tidak sedar bahawa si mati memegang G bahagian kanan cerminnya keretanya. Isu adalah sama ada tertuduh telah melakukan: (i) kesalahan membunuh di bawah s 300 Kanun Keseksaan; atau (ii) sama ada beliau boleh disabitkan di bawah s 304(a) atau (b), iaitu homisid salah yang tidak terjumlah kepada pembunuhan; dan (iii) sama ada beliau telah melakukan kesalahan menyebabkan kematian dengan tindakan gopoh dan cuai di bawah H s 304A.

Diputuskan:

(1) Memandangkan fakta bahawa si mati telah mengejar kereta tertuduh dan memegang cermin bahagian kanan semasa beliau I mengundurkan kereta dari luar anjung, akal biasa (common sense) menunjukkan bahawa niat untuk menyebabkan kematian

si mati tidak mungkin terbentuk di dalam minda tertuduh semasa si mati lari keluar dari rumah. Ia juga tidak boleh dibentuk semasa si mati memegang cermin tepi kereta oleh kerana di dalam perjalanan biasa kejadian tiada sesiapa boleh mempunyai niat sebegitu secara tiba-tiba di dalam tempoh masa yang singkat. Selepas tertuduh menekan pemecut untuk menggerakkan kereta ke hadapan dan di dalam proses melanggar tertuduh, beliau bukan dalam kedudukan untuk mengawal keseriusan kecederaan yang akan menimpa si mati. Dengan jelas, kecederaan-kecederaan tersebut adalah bayangan tindakannya daripada bayangan niatnya. Oleh kerana kesalahan membunuh di bawah s 300 Kanun Keseksaan proviso (a), (b) dan (c) memerlukan elemen mental membunuh dengan niat, maka tertuduh tidak boleh dipanggil untuk memasuki pembelaan di atas pertuduhan membunuh di bawah proviso (a), (b) dan (c) s 300 Kanun Keseksaan (lihat ms 803C–F).

(2) Di bawah proviso (d) s 300, pihak pendakwaan mestilah membuktikan bahawa tertuduh mengetahui bahawa tindakan menggerakkan keretanya ke hadapan dengan cara yang dibuatnya adalah pasti berbahaya. Dengan mengambil kira di mana tertuduh berada pada masa tersebut, tertuduh tidak boleh secara munasabah dijangka mengetahui bahawa memandu kereta dengan cara yang dilakukan adalah sebegitu berbahaya bahawa ia mestilah berkemungkinan besar menyebabkan kematian atau kecederaan anggota yang berkemunginan besar menyebabkan kematian. Kejadian tersebut boleh berlaku sebagai akibat terus dilanggar tanpa sengaja oleh tertuduh dan bukannya tindakan terus memandu secara sengaja kereta tersebut ke arah si mati untuk menyebabkan kecederaan selepas mengetahui si mati telah dilanggar. Tertuduh tentu boleh diharap sebagai orang yang munasabah untuk mengetahui di dalam situasi berikut bahawa kecederaan yang serius akan diakibatkan ke atas tertuduh tetapi ini adalah tidak mencukupi untuk mencapai suatu kes yang diliputi proviso (d) s 300 (lihat ms 803I–804A, C–E).

(3) Seksyen 304(a) memerlukan niat menyebabkan kematian atau kecederaan anggota yang berkemunginan besar menyebabkan kematian. Selepas mendapati bahawa tiada niat sedemikian di pihak tertuduh, maka tertuduh tidak boleh disabitkan untuk kesalahan ini. Seksyen 304(b) sebaliknya hanya memerlukan pengetahuan, sama ada secara terus atau konstruktif. Memandangkan situasi di mana tertuduh berada, mahkamah tidak dapat mencapai suatu penemuan iaitu tertuduh mempunyai pengetahuan bahawa, dengan memecut sementara si mati berada di bahagian kanan kereta sambil memegang cermin di tepi, tindakan ini berkemungkinan besar akan menyebabkan kematian si mati (lihat ms 805D–F).

(4) Seseorang sudah tentu boleh menyimpulkan secara munasabah bahawa dengan memecut dengan cara yang sedemikian

berbahaya, tertuduh mempunyai pengetahuan bahawa bahaya akan diakibatkan kepada si mati sehingga terdapat kecederaan parah diakibatkan ke atas si mati. Tetapi kesalahan homisid salah memerlukan pengetahuan bahawa kematian adalah satu kemungkinan yang besar — bukan hanya pengetahuan bahawa kecederaan parah akan berkemungkinan besar diakibatkan. Maka mahkamah mendapati bahawa tertuduh tidak boleh di bawah keadaan-keadaan tersebut dikatakan telah melakukan kesalahan homisid salah yang tidak terjumlah kepada membunuh dengan niat di bawah s 304 (a) atau (b) (lihat ms 805H–I, 806D).

(5) Suatu unsur yang diperlukan bagi kesalahan menyebabkan kecederaan parah ialah tertuduh telah melakukan kesalahan tersebut secara sukarela seperti yang didefinasikan di bawah s 39 Kanun Keseksaan. Bukan saja tindakannya kekurangan niat atau pengetahuan tetapi ia juga kekurangan unsur yang penting ini iaitu 'sukarela'. Adalah jelas bahawa tindakan tertuduh adalah jauh daripada sukarela dan dengan itu tuduhan untuk kesalahan menyebabkan kecederaan parah tidak boleh disimpulkan (lihat ms 806F, G, 807A).

(6) Mahkamah mendapati bahawa kebersalahan tertuduh jatuh di bawah s 304A Kanun Keseksaan. Dari masa si mati memegang cermin, tertuduh mestilah menerima tanggungjawab untuk tidak melakukan sesuatu yang gopoh atau cuai yang boleh menyebabkan kecederaan kepada si mati. Dengan memandu terus pada masa tersebut, tertuduh telah menonjolkan suatu kelakuan yang menunjukkan bahawa beliau tidak mengambil langkah beringat-ingat yang cukup dan wajar untuk mengelak si mati tercedera dan dengan itu adalah gopoh dan cuai (lihat ms 807B, 808F).

(7) Sementara mahkamah boleh menerima sebagai munasabah bahawa tertuduh mungkin tidak sedar di peringkat permulaan sementara mengundurkan keretanya bahawa si mati mengejarnya selepas beliau memberi isyarat kepadanya untuk berhenti, mahkamah tidak boleh menerima hujahannya bahawa beliau tidak sedar isterinya telah memegang cermin bahagian kanan. Adalah menakjubkan bahawa beliau gagal untuk prihatin akan kehadirannya memandangkan bahawa beliau lari keluar dari rumah dan hanya beberapa inci jauh darinya semasa si mati memegang cermin di tepi (lihat ms 812H–813A).

(8) Tertuduh tidak mungkin tidak sedar akan kemungkinan kecederaan terhadap si mati apabila beliau memandu keretanya semasa si mati hanya berada di tepi keretanya sambil memegang cermin di tepi. Beliau dijangkakan di dalam keadaan tersebut akan mengambil langkah beringat-ingat untuk mengelak daripada menyebabkan kecedraan kepada si mati di mana beliau gagal berbuat demikian. Maka dengan itu, beliau adalah gopoh atau

A cuai atau kedua-duanya. Beliau gagal untuk membangkitkan keraguan munasabah di dalam kes untuk pihak pendakwaan di atas pertuduhan tersebut dan dengan itu mestilah didapati bersalah dan disabitkan untuk pertuduhan seperti yang terpinda (lihat ms 813D–F).

B (9) Seksyen 304A tidak memperuntukkan dua kesalahan yang berbeza iaitu: (i) menyebabkan kematian dengan tindakan yang gopoh; dan (ii) menyebabkan kematian dengan tindakan yang cuai. Seksyen tersebut hanya memperuntukkan kesalahan tunggal menyebabkan kematian melalui tindakan yang boleh digambarkan sebagai gopoh atau cuai tetapi tidak terjumlah C kepada homisid salah. Walaupun mengandaikan bahawa pertuduhan telah dinyatakan secara tidak betul untuk menggambarkan tindakan tertuduh sebagai 'gopoh dan/atau cuai' apabila pertuduhan hanya patut menyatakan sama ada gopoh atau cuai, kesilapan tersebut hanya berkenaan dengan butir-butir pertuduhan yang tidak memprejudis tertuduh. Maka ia boleh D diselamatkan di bawah s 156 Kanun Acara Jenayah (lihat ms 815A–B, H–I).

(10) Dengan mengambil kira semua faktor yang relevan terutamanya penyesuaian yang tertuduh terpaksa buat kerana tinggal bersama si mati (suatu fakta yang tidak dipertikaikan di dalam keterangan) E yang kemungkinan besar menyebabkannya untuk bertindak dengan cara yang sedemikian gopoh atau cuai pada hari yang dipersoalkan, dan usia tertuduh, hukuman adalah pemenjaraan untuk suatu tempoh enam bulan berkuatkuasa dari tarikh penahanan (lihat ms 816G–H).]

F **Notes**

For cases on murder generally, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1155–1189.

For cases on culpable homicide not amounting to murder generally, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1242–1247.

G For cases on causing death by negligence generally, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1248–1272.

Cases referred to

Adnan bin Khamis v PP [1972] 1 MLJ 274 (refd)
Dato' Seri Anwar Ibrahim v PP [2000] 3 MLJ 638 (refd)
H *Manohar v State of Andhra Pradesh* 1975 Cr LJ 446 (refd)
Nidamarti Nagabhushanam, Re 7 MHCR 119 (refd)
R v Graham 74 Cr App R 235 (refd)

Legislation referred to

I Criminal Procedure Code ss 156, illus (b), 163
Penal Code ss 39, 299, 300, illus (d), 302, 304, 304A, 320, (a), (b), (c), (d)

Hanafiah Zakaria (Deputy Public Prosecutor) for the prosecution. A
Muhammad Shafee bin Md Abdullah (*Shafee & Co*) for the accused.

Kang Hwee Gee J: The accused was charged with the murder of his wife. He was alleged to have caused her death by driving his Mercedes Benz E230 into her on the road in front of their house after he had reversed the car out of the porch at about 6.30pm on 23 June 1999. B

At the time of incident, their gardener Zulklifli was tending to the garden by the side of the porch. He gave evidence that at about 6.30pm the accused had arrived at the house and entered it through the small side gate. Another car, a Proton Wira (later ascertained to be driven by Rahim, the brother of the accused) had entered the house. It was parked behind the C Mercedes Benz E230 at the porch.

A short while later Zulklifli saw the accused reversing his car out of the porch. He saw the accused's wife, the deceased chasing after the car. After the accused had completed reversing his car out of the compound of the house and was out of his view, he heard the scream of a woman. He went D out to investigate. He saw the Proton Wira being driven away followed by the Mercedes Benz.

He found the deceased lying on the road outside some 30 feet away from the house.

An immediate neighbour Halimah bte Daud was at the kitchen of her E house when she heard the sound of a woman crying. She crossed over to the accused's house by the common gate seperating the compounds of the two houses — just in time to see the deceased being carried by Zulklifli the gardener and another neighbour, Tuan Ibrahim from the road into the compound of the house.

F

The deceased was eventually brought to the Ampang Puteri Hospital where she was admitted to the emergency ward and was attended to by a team of three doctors led by Dr Mahmood (PW18), a urologist with the hospital.

Dr Mahmood said she was brought to the hospital in state of shock but G was still able to communicate with him. She had bruises all over her face and lower part of her abdomen and her ankle. She was also bleeding from the vagina. Surgery was conducted to repair the injuries. Her kidney was found to be completely shattered with the main left renal artery completely torn. Her bladder had been detached from the vagina wall and there was massive bleeding from the retro pubic vein. According to Dr Mahmood, the H massive trauma on the left renal artery and veins, kidney and the retro pubic veins had led to massive blood loss that she could not be saved. She passed away at about 4.15am on 24 June 1999.

A post-mortem was conducted by the forensic pathologist Dr Zahari Noor (PW12) in the forenoon of the same day. I

On external examination of the body, he found 19 injuries on the deceased which he categorized as:

(1) Abrasions on the right eye lid, right side of the face below the right eye lid, nasal bridge, left side of the lip, centre of the chin, upper part of left side of the face, anterior part of right foot, upper part of breast, anterior and lateral aspect of left chest extending down to the right to the left side of abdomen, medial part of left ankle to the hind of the left foot.

(2) Grazed abrasions on back of the left chest until the left loin, centre of the back, right iliac region, posterior and lateral and medial aspect of right arm and ankle.

(3) A periobital haemotama on the right eye.

On examining the body internally he found:

(1) A small bleeding of the cerebrum or subarachnoid haemorrhage in the head.

(2) Multiple fractures of the ribs on the left posterior and front region.

(3) Lacerations on the pedicle of the kidney 8cm long, and also on the bladder.

(4) Fractures of the pelvic bones and dislocation on the left and right side of the sacroiliac joint.

He also found evidence of crush and impact, consistent with the force being applied between the underside of a car and the ground:

(1) on the fractures of the back of the left ribs and front right ribs.

(2) on the fractured and dislocated pelvic bones at the sacroiliac joints and dislocates symphysis pubis which had in turn caused the injury to the bladder.

He concluded that the deceased had died from injuries incurred within the pelvic and intra abdominal region which were brought about by crush and blunt impact which led to the laceration internally of the left kidney and of the front and back of the bladder causing in turn the loss of blood, traces of which were found at the peritoneum and at the back of it.

Did the accused cause the injuries

Exactly how the deceased met with her injuries was not described by any of the witnesses called by the prosecution.

Be that as it may, the prosecution had proved at this stage of the trial that the injuries suffered by the deceased that led to her demise was caused by being run over by the car driven by the accused when he accelerated away after having reversed out of his porch. This is clear from the testimony of Abdul Rahim (PW13) who saw the deceased holding on to the right wing mirror of the accused's car (an event happening immediately before Zulklifli the gardener heard the scream) there being no other car in the vicinity except the two outside the house at the time.

Abdul Rahim the driver of the Proton Wira was a brother of the accused. He was in the car which was on the road outside the house at the

time of incident and was therefore logically in a position to give an account of it. He had however stopped short of describing the event which followed that would have explained precisely how the deceased came to be injured.

He said he could not see what happened beyond the point when the deceased was seen holding on to the rear wing mirror because by that time the rear portion of his car had reached the other side of the road.

The omission to describe the event was clearly deliberate as it does not stand to reason how he could have failed to see what happened next to the deceased given the fact that the act of the deceased in holding on to the wing mirror constituted the continuation of a sequence of event leading to the apex of the narrative happening before his eyes in circumstances which he could not possibly have failed to see. He seemed to me to have the propensity to favour the accused when giving evidence before the court.

Nevertheless there is no reason why his evidence which told against the accused although seemingly incomplete, should not be accepted for what it is worth. Rahim had described in detail how the deceased had run after the car as the accused was reversing his car out of the porch. She went on to hold on to the right wing mirror when the accused had completed reversing the car out of the porch of the house and was in a position to move forward.

This he could see as the accused's car was in front of him while he himself was reversing his own car out of the porch.

The relevant part of his evidence was as follows.

On the day of incident at about 11.30am the accused came to see him at his house wearing a round neck T-shirt and a pair of dark trousers. He appeared exhausted and complained that he had been mistreated by his wife, the deceased. The accused told him that in order not to aggravate the situation at home he had to get out of the house in a hurry. The accused stayed over until about 6pm and as he had arrived by taxi, Rahim had to send him back in his Proton Wira car. He left the accused at the front gate of his house but decided to return back a short while later to check whether the accused was alright. The accused opened the gate of the house to let his car into the porch area of the house where two cars were being parked. He parked his car behind a Mercedes Benz car belonging to the deceased on the left but still partially blocking the accused's own Mercedes Benz E230 which was parked to the right.

He got out of his car. The accused had assured him he was alright, but a little while later before he could get back into his car to return home, the accused came out of the house again. The accused got into his Mercedes Benz E230 car, started it.

What transpired next provides the actus of the charge against the accused. For clarity it is appropriate that it be set out verbatim in the words of the witness in mixed Malay and English:

At p 75 of the notes of evidence he said:

> Saya lihat abang saya keluar dari rumah lalu masuk ke dalarn kereta Mercedes JDY 230 lalu menghidupkan engine kereta. Saya lihat lampu reverse left

bernyala. Kereta itu berundur. Oleh kerana kereta saya diletakkan di belakang kereta Mercedes satu lagi yang akan obstruct beliau, saya pun masuk ke kereta. Sambil saya mengundur kereta saya YKT pun sedang mengundur kereta beliau. He was on my left and I was ahead of him.

Sketch plan i/d P5:

Saya undur kereta saya towards the left side out of the gate uphill. YKT was slowly reversing following me. I was ahead of him. Pada ketika itu saya lihat Kak Anim (the deceased) berlari keluar daripada rumah mengikut porch di celah kereta beliau dalam keadaan luar biasa — laju, macam mengejar sesuatu, memakai baju labuh dan longgar ke arah kereta YKT. Pada masa itu kami berdua sedang mengundurkan kereta masing-masing. In a split second I saw her clinging to the side right hand wing mirror of the car dengan kedua-dua belah tangannya dalam keadaan seolah seperti mahu memberhentikan kereta.

At p 76:

When I saw Kak Anim pulling the right wing mirror of the car, the car was already past the gate already on Jalan Geliga. His car was already in a position to move forward. I could only see part of his car as there was a slope.

At p 78:

When Kak Anim came out of the house I was in the process of reversing. My car was already outside the gate by then. Even when Kak Anim held the rear wing mirror, I was still in the process of reversing. The rear portion of my car had already reached the other side of the narrow road Jalan Geliga. At this point of time, I could no longer see Kak Anim. I could only see the wing mirror dislodged.

Apart from the evidence of Rahim and Zulklifli, forensic evidence had clearly established beyond doubt that the deceased had been run over by the car considering the extent of the injuries found on the deceased particularly on the ribs and pelvic bones, which the forensic pathologist Dr Zahari Noor attributed to the effect of impact and crush.

Further, the pathologist who also examined the car some 20 hours later at the Gombak Police Station found a dent on the lower right portion of the car underneath the right rear door with blood stains at the dented area. He collected samples (exh P11(1)(a) and (b)) of the stains. The chemist, Hitaya Jeevan (PW 6) who put the two samples through DNA analysis conformed that the blood samples were from the deceased as they matched the sample (exh P10(1)(a)) taken from the deceased during post mortem and another blood sample (exh P11(3)(a)) collected on the road by the same pathologist in front of the house where the incident was alleged to have taken place.

He also found the right wing mirror of the car detached — a finding consistent with Rahim's evidence that the deceased had been holding on to it at the material time.

The chemist was also able to confirm that the mark 'P6000' found on the dress worn by the deceased and removed during post mortem by the pathologist for the purpose of his examination corresponded to and

matched the impression found on the side wall of each of the four tyres of the same car which he had also examined. Taken together with the extensive injuries as found by the pathologist it is clear that the deceased had been run over by the car driven by the accused.

Did the accused commit murder?

Having established that the accused had caused the death of the deceased the next question that must be determined is whether the accused had in law committed the offence of murder of the deceased under s 302 of the Penal Code.

The offence is defined in the two complementary sections of the Penal Code as follows.

Section 299 of the Penal Code reads:

> Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 300 of the Penal Code reads:

> Except in the cases hereinafter excepted, culpable homicide is murder
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely, or to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.
>
> *Illustrations*
>
> (a) *A* shoots *Z* with the intention of killing him. *Z* dies in consequence. *A* commits murder.
>
> (b) *A*, knowing that *Z* is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing body injury, *Z* dies in consequence of the blow. *A* is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if *A*, not knowing that *Z* is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here *A*, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.
>
> (c) *A* intentionally gives *Z* a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. *Z* dies in consequence.

A Here *A* is guilty of murder, although he may not have intended to cause *Z*'s death.

(d) *A*, without any excuse, fires a loaded cannon into a crowd of persons and kills one of them, is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

B The offence of murder it is clear, requires the intention to cause death or to cause such bodily injury as the accused knew is likely or sufficient to cause death.

In the instant case, however, one can safely rule out any premeditation before the fact to commit murder by using the car on the part of the C accused. Given the fact that the deceased had chased after the accused's car and had held on to its right wing mirror while he was reversing it out of the porch, common sense dictates that the intention to cause the death of the deceased could not have been formed in the mind of the accused at the time the deceased ran out of the house. Neither could it be formed at the time she held on to the wing mirror as in the normal course of event no person D could have harboured that intention on the spur of the moment within that split second in time.

Indeed it was submitted by the deputy public prosecutor that the extensive injuries suffered by the deceased only go to indicate the intent of the doer to commit culpable homicide — for how else could one explain the E act of a person who caused such injuries on the deceased? The argument appears to have lacked objectivity. It missed the point that once the accused stepped on the accelerator to move the car forward and in the process had knocked down the deceased he would not be in a position to control the seriousness of the injuries that would befall her. Clearly, the injuries were a manifestation of the consequence of his act rather than a manifestation of F his intent.

As the offence of murder under s 300 of the Penal Code provisos (a), (b) and (c) requires the mental element of intention to kill, it follows that the accused could not be called to enter his defence on a charge of murder under the provisos, (a), (b) and (c) of s 300 of the Penal Code.

G With respect to the proviso (d) of s 300 (the provision which the prosecution is relying on) it is clear to me that for this provision to apply the accused must know that the act he is committing was so imminently dangerous and committed in utter disregard that death would result from such an act.

H I accept the comments of the learned authors of *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at p 12797 that this proviso contemplates the doing of an imminently dangerous act to people in general and not the doing of any act to any particular individual. The illustration (d) of s 300 (of firing a cannon into a crowd) serves to illustrate the point.

But even assuming that the proviso (d) could be interpreted to include I the doing of an act to an individual (as in the case of the deceased) murder still cannot be committed under this provision; for although it does not speak of intention as in the other three provisions, the prosecution must still

prove that the accused knew that his act of moving the car forward in the way he did was so imminently dangerous.

In my judgment, taking into consideration where the deceased was at that point of time, the accused would not reasonably be expected to know that driving the car off in the manner he did was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The consideration would be different if the deceased was at the rear or in front of the car and not by the side of it in which case one may be able to find that the accused may have that required knowledge.

The consideration would also be different if he had nevertheless driven off having known that the deceased had been struck down by the car in which case he must be taken to have known that it was imminently dangerous to drive away in that situation. There was absolutely no evidence that this was the case.

It is true the nature of the injuries described by both the doctors and the tyre imprint as found by the chemist on the deceased's clothing indicate clearly that she had been run over by the car. But in my judgment the incident could have occurred as a direct result of having been knocked down unintentionally by the accused rather than by the deliberate act of continuing to drive the car over her to cause the injuries after having known that the deceased had been knocked down.

He would be expected of course as a reasonable man to know in that situation that some grievous hurt would be caused to the deceased but this is certainly insufficient to find a case within proviso (d) of s 300. To find a case under provision (d) of s 300 the knowledge required is no less than knowledge that his act would in all probability cause death or such bodily injury as is likely to cause death. And nothing less would suffice.

The conduct of the accused after the fact

Before leaving the issue I need to consider at this stage an evidential aspect of the case raised by the deputy public prosecutor in his submission with respect to the conduct of the accused after the fact:

(i) in departing from the scene of incident by continuing to drive off even after having known of that the deceased had been knocked down;

(ii) in not returning to see the deceased at the hospital after having known of her accident; and

(iii) in returning to the house only in the morning after having known of the demise of the deceased having lodged himself at the MINT hotel.

It was submitted that the conduct was consistent with the intention to cause the death of the deceased. Why would a person who was innocent fear to return to attend to his wife whom he knew was involved in an accident in which he was not involved in?

It is true that a person's conduct after the fact can often provide some evidence that is consistent with his knowledge or guilt. A thief would take to his heels when chanced upon carrying stolen property; a drug trafficker

would abandon the consignment of drug he was carrying on being stopped for questioning. However, in the instant case it is a matter of common sense that no such inference can be drawn, as it was clear from the antecedent immediately preceding the incident that he could not have harboured the intention to cause the injuries to the deceased. The incident it is to be called stems from the conduct of the deceased herself in running out of the house iIn pursuit of the accused. If any guilt could be inferred from his conduct after the fact in this case, it was indicative more a guilt of having committed an offence and being unable to face the music than a manifestation of his intention to commit an offence.

Whether case is proved under s 299 read with s 304 of the Penal Code

Having found that the offence of murder could not be committed by the accused, the next stage is to consider whether he could be convicted under s 304(a) or (b) of the Penal Code — that is to say culpable homicide not amounting to murder.

Section 304(a) requires intention to cause death or such bodily injury as is likely to cause death — the same requirement as in s 300(a) discussed earlier. Having found that there was no such intention on the part of the accused, it follows that the accused cannot be convicted of this offence.

Section 304(b) on the other hand merely requires knowledge, whether direct that is to say, an awareness or understanding that a fact or circumstance probably exists; or constructive that is to say, of the kind that one using ordinary care or diligence would possess (see *Merriam Webster's Dictionary of Law,* 1996 Ed).

Given the situation the accused was in (as described earlier), I am unable to come to a finding that the accused had the knowledge that by accelerating away while the deceased was at the right side of the car holding on to the wing mirror that he had the knowledge that this act was likely to cause the death of the deceased.

Again as mentioned earlier, the consideration would be different if the deceased came out of the house and had positioned herself in front of the car such that she was in his view and that he had regardless accelerated away causing her to be knocked down in the process. In such a situation it would be possible to find that he had the knowledge that the act was likely to cause death, or to cause such bodily injury as is likely to cause death — and therefore commit an offence of culpable homicide not amounting to murder under s 304(b) of the Penal Code or for that matter, even an offence of murder under s 302 if the intention to cause death is proved.

One can of course reasonably conclude that by accelerating away in such a violent manner, the accused had the knowledge that some harm may be caused to the deceased to the extent that some form of grievous hurt could have been caused to the deceased. But the offence of culpable homicide requires knowledge that death is likely to result — not merely knowledge that grievous hurt is likely to result — a criteria which for the reason alluded to earlier had not been established.

The following commentary in *Ratanlal & Dhirajlaj's Law of Crimes* (24th Ed) at p 1252 relying on Palani Gourdan 1919 42 Mad 547 (F13), Sri Krishnan 1972 Cri U 1313 (SC) and Sornavelaytithan 1977 Cr U 42 (SC) amongst others clarifies the point:

> Death caused without intention or knowledge is not culpable homicide — The offence of culpable homicide presupposes an intention, or knowledge of likelihood, of causing death. The intention must be directed either deliberately to putting an end to human life or to some act which to the knowledge of the accused is likely to eventuate in putting an end to human life. The knowledge must have reference to the particular circumstances in which the accused is placed and the intention demanded by the section must stand in some relation to a person who either is alive or who) is believed the accused to be alive. In the absence of such intention or knowledge, the offence committed may be the offence of causing grievous hurt or simple hurt. Where injuries have been followed by death and the question is what offence has been committed, it is not concluded by any backward reasoning as to presumable intention from the mere fact that injuries caused did in fact result in death. What has to be seen is what degree of injury the accused actually intended and what he knew as to the consequences of such injury.

I must accordingly so find for the reasons given that the accused could not under the circumstances have committed an offence of culpable homicide not amounting to murder under s 304(a) or (b) of the Penal Code.

Whether offence of causing grievous hurt is proved

Having decided there was no intention on the part of the accused to cause death and that he did not have the knowledge that what he did would in all probability cause death and therefore cannot be made liable in murder or culpable homicide the next step is to consider whether the accused had committed any offence of causing grievous hurt as defined under s 320 of the Penal Code.

An essential ingredient of the offence of causing grievous hurt requires an accused to commit that offence voluntarily as defined under s 39 of the same Code:

> A person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

In as much as his action lacked intention or knowledge it also lacked that essential element of 'voluntarily'. Given the situation in which the accused had found himself in at that point of time (the deceased holding on unyieldingly to the wing mirror of his car), his subsequent action to step on the accelerator of his car nevertheless, was at most an act committed on the spur of the moment-executed before his sane mind could comprehend in that brief moment that his action could result in causing such grievous injuries to the deceased which eventually led to her death.

Again the consideration would be different if the deceased was in front of the car in which case, it would have to be presumed in the normal course of event that he knew or had reason to believe that harm may befall the

deceased. It was clear to me therefore his conduct as it was, fell short of being voluntary and therefore a charge for an offence of causing grievous hurt could not be preferred.

An offence under s 304A — Causing death by a rash or negligent act?

The act of the accused I am convinced, was committed without criminal intent apart from the rashness and or negligence a conduct which he clearly exhibited. His culpability therefore falls only under s 304A of the Penal Code which provides as follows:

> Whoever causes the death of any person, by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

Under this section all that is required for the prosecution to prove is that the accused had caused the death of the deceased by a rash or negligent act, that the act of the accused in causing his car to have come into contact with the person of the deceased was rash and or negligent.

There is a dearth of authorities on s 304A of the Penal Code, particularly with respect to what conduct can be termed as rash and what as negligent. Reference must therefore be made to commentaries on the subject by established authors for guidance.

The commentary of the learned authors of *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed) at pp 1509–1510 on 'rash or negligent act' reads as follows:

> 6 'Rash or negligent act' — A rash act is primarily an overhasty act, and is this opposed to a deliberate act, but it also includes an act which, though it may be said to be deliberate, is yet done without due care and caution. Illegal omission is 'act' under this section and may constitute an offence if it is negligent.
>
> Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences.
>
> Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the. charge has arisen, it was the imperative duty of the accused person to have adopted. 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' The Supreme Court has observed to the same effect. In order to establish criminal liability the facts must be such that the negligence of the accused goes beyond a mere matter of compensation between citizens and shows such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

> 'Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness (luxuria). Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that if he had he would have had the consciousness. The imputability arises from the neglect of the civic duty of circumspection. It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the direct producers of death. To say that because, in the opinion of the operator, the sufferer could have borne a little more without death following, the act amounts, merely to rashness, because he has carried the experiment too far, results from an obvious and dangerous misconception ... It is clear, however, that if the words 'not amounting to culpable homicide' are a part of the definition, the offence defined by this section consists of the rash or negligent act, not falling under that category, as much as of its fulfilling the positive requirement of being the cause of death. Negligence is the genus of which rashness is a species.'

The Federal Court in *Adnan bin Khamis v PP* [1972] 1 MLJ 274 at p 274 has laid down the test to be applied for determining the guilt or innocence of an accused person charged with rash or negligence conduct under s 304A of the Penal Code is to consider:

> Whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury.

From the time that she had held on to the mirror, the accused must be taken to have assumed the responsibility not to do anything rash or negligent that may cause any injury to the deceased. By driving off at that point of time the accused had exhibited a conduct indicative that he had not taken any adequate and proper precaution to avoid causing her the injuries and was therefore rash and negligent.

I must therefore find at this stage that a prima facie case had been made out against him under s 304A. The charge will have to be amended accordingly as follows:

> Bahawa kamu pada 23 Jun 1999, jam lebih kurang 6.30 petang, di Jalan Geliga, Taman Setia, di dalam Daerah Gombak, dalam Negeri Selangor Darul Ehsan, telah menyebabkan kematian ke atas Faridah binti Mohd Rahman, Kad Pengenalan bernombor 441207–01–5538 dengan melakukan perbuatan yang gopoh dan/atau cuai. Oleh demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 304A Kanun Keseksaan (Akta 574).

The defence

The accused gave evidence on oath.

He said that at about 7.30am on the day of incident he had a tiff with his wife the deceased over the whereabouts of his international passport which the deceased had wanted to keep to control his movement. When the deceased started to throw his handphone, tear up his phone dairy, broke his golf club he found it necessary to leave the house hurriedly by taxi dressed only in a round-neck T-shirt and a pair of jeans to seek refuge at the house of his brother Rahim on whom he poured out his grouse.

At about 6pm on the same day Rahim drove him back to his house in his Proton Wira car. However when Rahirn returned a while later in order to enquire whether he was alright and after assessing the situation he decided to go out of the house for a while using his own Mercedes Benz E230 which was parked by the side of the deceased car at the porch. By this time Rahim had parked his car behind his and Rahim had to reverse his car out of the porch before he could do likewise.

The accused maintained that he did not know how his wife came to be injured by the event described by the two crucial witnesses for the prosecution Zulklifli and Rahim. He claimed that he was not aware that she had chased after his car after he had indicated to her with his hand not to follow him when he was about to reverse it. He was also not aware that she had grabbed the right wing mirror of his car after he had reversed his car out to the road. This was how he explained it in his testimony:

At pp 150–152 of the notes of evidence:

> I entered my house through a small gate which had been opened by the gardener.
>
> The gardener wished me when he saw me entering. He was Zulkifli (PW2). I proceeded into the house. I saw my wife watching TV at the sitting room. I wished her the usual Muslim greeting.
>
> I hanged around at the kitchen area. Apart from my late wife, my helper Hemy (produced and identified)and also my little adopted daughter (Nora) were also in my house.
>
> I then walked out to the garden area and spoke to the gardener.
>
> Before I went out to the garden, I patted her on her shoulder. I said 'Sudah makan, belum.' She appeared normal but she did not respond.
>
> I told the gardener to cut some branches here and there.
>
> While with the gardener, I heard sound of a car horn. Rahim's car — same car that he sent me here with.
>
> I re-entered the house and pressed the gate button to open the gate. One side of the electric gate was not functioning and I had to push it open by hands.
>
> Rahim asked me if I was alright — I said OK. I re-entered my house. Rahim appeared worried for me. Anything could happen in the house.
>
> When I re-entered my house, I saw my wife was on the phone. I told her Rahim had come, and waited for her to finish her phone conversation. We then walked away from the phone She went to where the TV was where the helper and my little daughter were. My daughter was recovering from chicken pox at the time.

I then went out to my car JDY 230-silver metallic Mercedes (exh P7 — outside the court). A

I opened the door and I started the engine of the car. My car was in the driveway in the porch side by side with another black Mercedes E200 normally used by my late wife.

I put the reverse gear on after having started it. Car moved back I then saw my wife at the entrance door of my house. She stepped out of the house and advanced a few steps from the door towards my car. She saw me. I gave her a hand signal intending to tell her not to follow me and that I would be going only for a short while. I tapped on my watch to indicate this. B

I had intended to go out for a short while. I was worried that she may explode again.

I then reversed the car with my hand turning to the left as far back as possible in my normal style of reversing. C

The air con and radio were on automatically when I started the car. They were on when I was reversing the car (air con was almost full blast; radio-medium volume).

I normally do not use the side mirror of the car when reversing. I was used to look directly to the back so that I did not merely see segments of the back. D

As my house was on a slope I had to first reverse them turn left uphill. There were objects such as dustbins and flower pots on my left.

Rahim had reversed his car earlier after having parked it in the porch.

As I changed my gear from reverse to forward, I released my brake pedal in my normal way and tured the steering column clockwise when I was about to move forward. Because it was on a slope — the car would forward fast when I pressed on the pedal. E

I saw nothing in front. I did not hear anything. The car had moved forward. Then I saw my right wing mirror dangling at the point of time when the car had already moved forward.

My mind was disturbed when I saw the broken mirror. A few thoughts came to my mind. How was it broken, when was it broken. I imagined that some form of violence could have occurred to the mirror-somebody could have thrown stones on it and when? F

At this point of time, my wife did not cross my mind at all. I moved forward. I did not think at the time she could have caused that mirror to fall off the car. G

I did not see her at the side of my car throughout the reversing process.

A number of witnesses were called by the defence to convey the temperament of the deceased.

The maid Heny (DW3) was called to say that the accused and the deceased quarrelled frequently and that the deceased had always been the one who started it; that on the morning of the day of incident over breakfast she had threw her usual tantrum by throwing cups, saucers and the telephone at the accused. The deceased also broke a golf club belonging to the accused and that the accused had to leave the house when she went to fetch a broom to hit him. H I

The son and the (daughter of the accused, Mohd Rashdan (DW3) and Zamruddah (DW5) was called to say that there was some hostility had

developed between the deceased's blood relatives and the accused after the death of the deceased.

Their evidence were clearly irrelevant with respect to the culpability of the accused. The fact that the deceased may have had a less than perfect disposition and could have caused or contributed to the accused having acted one way or other would not excuse him from causing the death of the deceased in the manner described.

Another witness Lee Eng Eng (DW4), the General Manager Sales and Marketing of Cycle and Carriage the distributor of the Mercedes E230 car was also called to say that due to the sophisticated suspension system and sound proofing a driver driving the car may not be aware that he had run over a human being.

The intention to call a Dr Mahadevan as a witness

The defence had also wanted to call a psychiatrist, a Dr Mahadevan to give evidence both in his capacity as a medical doctor and a psychiatrist on the probable state of mind of the deceased as a result of the medication the deceased was undergoing which could have resulted in the deceased being delirious and irrational at the time of incident. The deputy public prosecutor objected on the ground that Dr Mahadevan was not the personal doctor of the deceased and was therefore not in a position to give evidence on the medication she was undergoing.

The psychiatrist according to counsel for the accused, would also be giving evidence as to the state of mind of the accused himself at the time when he was reversing his car based on several hours of interview the doctor had with the accused. As both rashness and negligence require proof of fault the opinion of the psychiatrist it was submitted, would be relevant to prove that in the state of mind he was in at the time the accused may not have known he had run over an object.

After hearing the short submissions of the parties I allowed the objection of the deputy public prosecutor and will now state my grounds for doing so.

Firstly, if indeed any evidence was required with respect to the medication the deceased was allegedly undergoing, the best person to give that evidence would be the doctor who had treated the deceased and not Dr Mahadevan. The best evidence rule requires that person to give such evidence.

Secondly, the state of mind of the accused was not a fact in issue since the accused did not in his testimony claimed that he was in an adverse state of mind that may have led him to drive off in such a manner as to have caused the death of the deceased. Indeed his defence was that he did not cause the death but that if he had indeed caused her death he did not know that he had done so. Any evidence tending to show his state of mind was therefore clearly not relevant and should not be allowed into evidence.

Thirdly, assuming that the state of mind of the accused had been brought about by the unreasonable behaviour of the deceased in her

medicated state (that is to say, by a duress of circumstances) this would not exonerate the accused from his criminal responsibility-unless the accused was insane at the time which clearly he was not. As Lord Lane CJ, in *R v Graham* 74 Cr App R 235 at p 241 said when considering the defence of 'duress of circumstances' (a term used here to describe a particular situation a person is forced by circumstances to be in):

> The law requires a defendant to have the self-control reasonably to be expected of the ordinary citizen in his situation. It should likewise require him to have the steadfastness reasonably to be expected of the ordinary citizen in his situation.

The law with respect to the right of an accused to call his witness to give evidence was restated by Lamin PCA in the recent Court of Appeal case of *Dato' Seri Anwar Ibrahim v PP* [2000] 3 MLJ 638. For the sake of brevity, I need only to quote from the head-note prepared by the editors of the report which sums up the law on the subject:

> In the context of legal process, it appears that it is not a matter of 'right' of any party to call a witness. Rather it is only a right to apply for a summons to be issued. In law a party cannot be denied the benefit of a witness who is prepared to give relevant material or relevant evidence. He has no right, legal or otherwise, to call any person not in possession of such evidence. So in the final analysis it is the court that decides and has control in the matter of calling witnesses in a criminal case so that only material witnesses will be summoned.

The law is clear. Only witnesses who can give relevant evidence can be called to testify. Dr Mahadevan, I am convinced, was not such a witness.

The finding

In essence the accused defence is that he did not cause the death of the deceased but that if he had caused it, he was not aware of it — without even so much as to admit that he had come later to realise that he had done so — thereby keeping open the possible defence that other person driving other vehicle may have caused it.

That it was the accused who had caused the injuries and subsequent death of the deceased is clearly beyond any doubt for the reasons I had adverted to earlier at the close of the case for the prosecution. Clearly, the defence has not raised any reasonable doubt on that finding. What must now be decided is only his claim of not being aware that he had knocked down the deceased and therefore could not have been rash or negligent, preposterous as it may appear.

The starting point for determining the culpability of the accused is from the moment the deceased ran from the house to chase after the accused when he was reversing his car out of the porch to the road outside.

While I can accept as plausible that the accused may not have realized in the initial stage while reversing his car that the deceased had chased after him after he had signalled to her to stop, I cannot accept his claim that he was not aware or conscious that his wife had held on to the right wing mirror. It is incredible that he could have failed to notice her presence given

A that she had just ran out of the house and was just inches away from him when she was holding on to the wing mirror.

Similarly, I cannot accept the evidence of Mr Lee Eng Eng, the General Manager, Sales and Marketing, of Cycle and Carriage that the accused may not have been conscious that he may have ran over the body of a person by
B reason that the car was so well sprung and insulated from outside noise despite his claim to have been an accomplished expert on Mercedes Benz cars. His opinion is preposterous. The body of a human being is an object of substantial bulk that no reasonable driver who had run over it would be unaware of.

Rahim's evidence was clear — the deceased had held on to the wing
C mirror of his car. Needless to say the resistance caused by her action had to be considerable to have led to its detachment that no reasonable man similarly circumstanced would have failed to notice or been unaware of her presence.

Applying the test in *Adnan bin Khamis*:

D

> Whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury.

The answer is clear and unequivocal — the accused could not have been
E unaware of the likelihood of injury to the deceased when he drove his vehicle off while the deceased was just by the side of his car holding on to the wing mirror. He was expected under the circumstances to have taken proper precautions to avoid causing the injuries to the deceased which he had failed to do. He was therefore in my judgment rash or negligent or both.

He has failed to raise a reasonable doubt in the case for the prosecution
F on the charge and must accordingly be found guilty and convicted of the charge as amended.

Before I proceed to consider the sentence to be passed on the accused, I need to consider a submission raised by counsel for the accused that a charge framed with 'rash and/or negligence (gopoh dan/atau cuai in Bahasa
G Malaysia) as it now stands, was bad for duplicity — this notwithstanding that he had not spoken a word with respect to its particulars when the amended charge was first read to the accused.

Admittedly, some difficulty was encountered in the framing of the amended charge with respect to whether to describe the act of the accused as rash or negligent, or as both rash and negligent. After having considered
H the options with respect to the conduct of the accused in acting in the manner he did, I had settled on the charge as it now stands. I shall now give my reasons.

The *Shorter Oxford English Dictionary on Historical Principles* (3rd Ed) defines 'rash' as hasty, impetuous, reckless, acting without due
I consideration or regard for consequence.

Negligence is defined as want of attention as to what ought to be done or looked after; lack of proper care in doing something. A negligent conduct

is defined as a conduct characterized by displaying negligence or carelessness. A

Despite some overlapping in the meanings of the two words, Indian courts seemed to distinguish between acts that are rash from acts that are negligent and had ruled that a charge framed with both the words is bad for duplicity, Hari Singh Gour in his commentary on the section in *The Penal Law of India* (10th Edi, 1983) at p 2750 relying on the definitions of the two words as interpreted by Holloway J in *Re Nidamarti Nagabhushanam* 7 MHCR 119, wrote: B

> A charge framed under s 304A would be defective if it used the words 'rashness' and 'negligence'. Criminal rashness and criminal negligence are two different things. The accused can be charged alternatively for rashness or negligence. C

However the same author in the commentary states that the High Court in Andhra Pradesh in the case of *Manohar v State of Andhra Pradesh* 1975 Cr LJ 446 at p 468 (AP) had found that a charge framed with the words 'in rash and negligent manner' containing both the elements of rashness and negligence would not prejudice an accused. D

Under s 163 of the Criminal Procedure Code, a separate charge has to be framed for every distinct offence that an accused commits. However whether or not a charge which specifies more than one offence is bad in law would depend on whether it offends the established common law rule of criminal procedure that an accused is entitled to a fair notice of the element of the charge which he is supposed to answer and whether he had been prejudiced by such an error or omission — a test reflected by a saving s 156 which states as follows: E

> Effect of Errors F
>
> No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission. [Illustrations (a) to (e) provided.]

Steven A Hirsch, in an article entitled '*Yap Sing Hock v PP*: Time for a quick and Decent Burial' [1993] 3 MLJ Lexis, draws a distinction between the elements (or what is more commonly described in courts as ingredients) and mere particulars and pointed out that a charge is bad only where the element specified therein had prejudiced the accused under the fair notice rule. He wrote at p lxxvii of his article which he fortified by reference to numerous case decisions, which I have no reason to doubt as correctly representing the law: G H

> The court failed to appreciate that every criminal charge contain two distinct types of averment: (i) a recitation of or reference to the elements (or 'ingredients') of the underlying statutory offence; and (ii) particulars which are not themselves elements of the underlying offence but which 'flesh out' the details of the allege crime. The first sort of averment, as the court correctly pointed out, is subject to the rule of strict construction in favour of liberty. I

Accepting Hirsch's article as correctly stating that there is need to distinguish between the element of a charge and its mere particulars, I do not therefore agree with the interpretation of Indian courts (relied upon by counsel) that s 304A prescribes two distinct offences of: (i) causing death by a rash act; and (ii) of causing death by a negligent act. In my view the section merely provides for a single offence of causing death by a conduct which can be described as rash or negligent but falling short of culpable homicide. The words 'rash or negligent' in s 304A it is clear to me, does not provide the element of the offence but merely the particulars by which the death can be brought about. That the Federal Court case in *Adnan bin Khamis*, had only prescribed one common test to be applied to determine whether a conduct is 'rash' or 'negligent', supports this view.

The English language thrives on accuracy of usage. Thus a rash conduct is to be distinguished from a negligent conduct although both relate in the wider sense to some discrepancy in doing or omitting to do something. Rashness it would appear constitutes the more serious of the two. As the learned authors of *Ratanlal & Dhirajlal's Law of Crimes* wrote 'Negligence is the genus of which rashness is a species'.

From the objective standpoint of the observer however, a rash conduct is often indistinguishable from a negligent one. One would be able to say with some certainty that the accused in the instant case had been rash as he had acted without due consideration or regard for consequence. On the other hand he could also have been negligent as he had been careless and had not exercise proper care when he drove off despite the presence of the deceased by the side of his car. Under the circumstances it would not have been as precise if the charge merely states that he was reckless or, in the alternative, that he was negligent. By reason of the closeness of the meaning of the two words it would have been more precise if the charge states that he was reckless and/or negligent — that would have put him on a more precise notice of what he was expected to meet in his defence. I had therefore considered it perfectly in order to have preferred the charge as it now stands.

Indeed the sample charge for an offence under s 304A of the Penal Code in *Ratanlal & Dhirajlal's Law of Crimes* (24th Ed, 1998) at p 1525 provides for both the words to be used with the conjunction 'or' as follows:

> That you, on or about ... at ..., caused the death of ... by doing a rash or negligent not amounting to culpable homicide, to wit... and thereby committed an offence punishable under s 304A of the Indian Penal Code, ...

It is up to the prosecution to prove the particulars which constitute the conduct of the accused that causes the death of the deceased and in the present case it had proved the accused had been rash and/or negligent.

To take the issue a step further — even assuming that the charge had been incorrectly framed to describe the accused's conduct as 'rash and or negligent' ('gopoh dan cuai') when it should have only described it as either being rash or being negligent, the error relates at most to the particulars of the charge which had not prejudiced the accused. It could therefore be saved under s 156 of the Criminal Procedure Code, and as he had not raised

the issue of duplicity when the charge was read to him or at any time before the close of his case, it may be legitimate to draw the inference that he had suffered no such prejudice under illustration (b) of s 156 of the Criminal Procedure Code, which provides as follows:

> *A* is charged with cheating *B*, and the manner in which he created *B* is not set out in the charge or is set out incorrectly. *A* defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this act that the omission to set out the manner of the cheating is not material.

Sentence

In a primitive society causing the death of another would most probably be retributed by the taking of another life — that of the person who caused the loss of the life without so much as leaving to consider any extenuating circumstances that led to the death.

In a civilized and rational society, however, human imperfections are given due consideration. Hence the death penalty are only reserved only for those who commit murder where the intention is to kill with malice aforethought.

There is a tendency to overlook the need to moderate the retributive element in certain cases which involve the loss of life in favour of imposing a severe punishment at all costs. One must bear in mind that in an offence under s 304A of the Penal Code the retributive element is no longer the unforgivable act of killing a human being with malice aforethought, but merely the rash or negligent act of the accused that led to the death of the deceased. For that reason the legislature has in its wisdom set a maximum sentence that can be imposed to 24 months imprisonment without closing the option to the court to impose a non-custodial sentence in appropriate cases.

Nevertheless the law still expects a person to give due consideration to the safety of others. Public interest therefore requires that any act of a person that causes the death of another cannot be disposed of lightly merely by the imposition of a fine except in very exceptional cases.

Taking all relevant factors into account in particular the adjustments that the accused had to make in living with the deceased (a fact not disputed in evidence) which probably could have led him to act in such a rash and negligent manner on the day in question, and the age of the accused, the sentence shall be an imprisonment for a period of six months with effect from the date of arrest.

Order accordingly.

Reported by Jafisah Jaafar